

1 THE COURT: The jury reports that they'd like to work
2 both Saturday and Monday. You're really not sure, are you, Mr.
3 Strapp?

4 The jury doesn't want to work -- they said they don't
5 want to work either day, so I think we'll not work on Monday.

6 MR. ROBERTSON: Is it a unanimous decision, Your
7 Honor?

8 MR. McDONALD: Can we poll the jury?

9 THE COURT: I didn't poll them -- I didn't ask them
10 either.

11 COURT SECURITY OFFICER: It was the majority.

12 THE COURT: Okay. You want to make your Rule 50
13 motion.

14 MR. McDONALD: I've been replaced for this one. Ms.
15 Hughey will be arguing.

16 THE COURT: All right.

17 MS. HUGHEY: Thank you, Your Honor. Lawson
18 respectfully moves this Court for judgment as a matter of law
19 under Rule 50 of the Federal Rules of Civil Procedure. ePlus
20 has been fully heard on the issue of infringement, and a
21 reasonable jury does not have a legally sufficient evidentiary
22 basis for find for ePlus on this issue.

23 The testimony and documents introduced at trial
24 demonstrate that Lawson did not directly or indirectly infringe
25 asserted claims three, 26, 28, or 29 of the '683 patent, claims

1 one, two, six, nine, 21, 22, or 29 of the '516 patent, or claim
2 one of the '172 patent. For this reason, Lawson requests the
3 Court resolve the issue of infringement against ePlus in this
4 case.

5 With respect to direct infringement, ePlus has not
6 proven that Lawson directly infringes the asserted claims.
7 During trial, Dr. Weaver provided his infringement opinion on
8 five Lawson accused systems: Inventory control, purchase order
9 and requisitions, also referred to as S3 procurement, RSS
10 combined with S3 procurement, punchout combined with S3 and RSS
11 procurement, EDI combined with S3 procurement and all modules
12 combined.

13 ePlus has not proven that it is more likely than not
14 that Lawson has made, used, offered to sell, or sold the
15 inventions defined in the asserted claims. A reasonable jury
16 does not have a legally sufficient evidentiary basis to find
17 otherwise.

18 With respect to the asserted systems claim three of
19 the '683 patents, claims one, two, six, nine, 21, 22, or 29 of
20 the '516 patent and claim one of 172 patent, ePlus has not
21 proven that Lawson's accused products have any of the required
22 elements. ePlus's expert, Dr. Weaver's testimony was
23 conclusory, unsupported, and insufficient to meet ePlus's
24 burden to prove that Lawson's accused systems have these
25 required elements.

1 ePlus also has not proven that Lawson practices all
2 of the steps required by method claims 26, 28, and 29 of the
3 '683 patent. At trial, ePlus did not even accuse Lawson of
4 performing all of the steps of these method claims. Indeed,
5 when questioned, Dr. Weaver never opined that Lawson performed
6 the step of maintaining at least two product catalogs on the
7 database containing data related to items associated with the
8 respective sources, selecting the product catalogs to search,
9 or searching for matching items among the selected product
10 catalogs.

11 Thus, the jury does not have a legally sufficient
12 basis to find for ePlus on the issue of direct infringement of
13 the method claims, and this Court should grant judgment as a
14 matter of law that Lawson does not directly infringe any of the
15 method claims.

16 With respect to indirect infringement, ePlus has also
17 not proven that Lawson indirectly infringes the asserted
18 claims. A reasonable jury does not have a legally sufficient
19 evidentiary basis to find otherwise. First, liability for
20 indirect infringement, either contributory or induced
21 infringement, requires proof of direct infringement.

22 ePlus has failed to prove that any third party,
23 either customers, vendor, or other, directly infringed any of
24 the claims in suit. Thus, a reasonable jury does not have a
25 legally sufficient evidentiary basis to find indirect

1 infringement.

2 Second, ePlus has not proven that the legal
3 requirements of indirect infringement have been met. Among
4 other things, both contributory and induced infringement
5 require intent, an element ePlus has failed to prove.
6 Contributory infringement requires proof that the accused
7 infringer offers a component of a patented machine knowing the
8 same to be especially made or especially adapted for use in
9 infringement of such patent and not a staple article or
10 commodity of commerce suitable for substantial non-infringing
11 use.

12 The Federal Circuit has instructed that for this
13 requirement to be met, plaintiff must show the defendant knew
14 that the combination for which its components were especially
15 made was both patented and infringing.

16 For induced infringement, a patentee must demonstrate
17 that the accused infringer's actual or constructive notice of
18 the patent and its intent to induce infringement of the patent
19 requires culpable conduct, namely that the alleged infringer's
20 actions induced infringing acts and that he knew or should have
21 known his actions would induce actual infringement.

22 Legal requirements for contributory and induced
23 infringement have not been met in this case. There is no
24 evidence that Lawson knew of the patents before the lawsuit was
25 filed in May of 2009, let alone had the intent required for the

1 contributory or induced infringement. Further, there is no
2 evidence that Lawson should have known of ePlus's patents.

3 Dr. Weaver's opinion on the issue of induced
4 infringement is totally irrelevant. Not only is it conclusory,
5 he did not consider the knowledge issue at all. The same is
6 true with respect to contributory infringement. With respect
7 to the accused punchout system, the jury does not have a
8 legally sufficient evidentiary basis to find for ePlus on the
9 issue of infringement.

10 Lawson did not practice all of the claimed method
11 steps with respect to the punchout product, and Lawson's system
12 does not meet all of the required system limitations with
13 respect to the punchout product. This Court should grant
14 judgment as a matter of law that the punchout system does not
15 infringe any of the asserted claims.

16 First, with respect to method claim 26, 28, and 29 of
17 the '683 patent, there has been no showing that any one party
18 performs every single one of the claimed method steps for the
19 punchout products.

20 There is no dispute that ePlus relies on the actions
21 of customers and third-party vendors in its argument that the
22 claim limitations are met with respect to this product. For
23 example, ePlus argues the step of maintaining at least two
24 product catalogs on a database containing data related to items
25 associated with the respective sources is met by external

1 vendor catalog, not Lawson.

2 Likewise, Dr. Weaver never asserted Lawson practiced
3 the step of determining whether a selected matching item is
4 available in inventory; instead, merely opining in a conclusory
5 fashion that punchout allows the step to happen while admitting
6 that Lawson did not have any idea what was available in the
7 inventory of the third-party vendors, and with respect to
8 searching for matching items, ePlus argues a user searches on a
9 vendor's website using a vendor search engine, which, again, is
10 a step that Lawson does not practice.

11 The systems claims are likewise deficient. Claim
12 three of the '683 patent and claims one, two, six, nine, 21,
13 22, and 29 of the '516 patent all require multiple catalogs.
14 Dr. Weaver opined that these claims were infringed by the
15 punchout product because punchout allows users to have access
16 to external vender catalogs, not Lawson catalogs.

17 Claim one of '172 patent is also a system claim which
18 requires a database containing data relating to items
19 associated with at least two vendors maintained so that
20 selected portions of the database may be searched separately.
21 Dr. Weaver opined that this limitation was met by the separate
22 databases of the external punchout site, but there is no
23 dispute that Lawson has not maintained separate databases of
24 the external punchout sites. Those external vendor catalogs
25 are maintained by the vendor.

1 ePlus cannot rely on the doctrine of joint
2 infringement to resolve the issue of direct infringement as it
3 has failed to show that Lawson has the required control over
4 the third parties or that Lawson performs the remaining steps.

5 In a situation in which more than one party is
6 required to perform the steps of a claimed method, there is no
7 infringement unless one party exercises control or direction
8 over the entire process such that every step is attributable to
9 the controlling party.

10 The same requirement for direction and control
11 applies to the system claims as well. Lawson does not exercise
12 control or direction over any third party, suppliers, vendors,
13 distributors, manufacturers, or others who sell items to
14 Lawson's customers. Likewise, Lawson exercises no control over
15 its customers. Lawson does not have an agency relationship
16 with any party that performs any of the remaining steps from
17 the system or method claims.

18 While Lawson may reach an agreement with certain
19 vendors to allow them to provide services to its clients --

20 THE COURT: What's the difference, Ms. Hughey,
21 between joint infringement and induced infringement in this
22 case on this record? I know conceptually what the difference
23 is, but is there really any difference in this case between
24 those two?

25 MS. HUGHEY: With respect to joint infringement,

1 that's related to direct infringement. Under direct
2 infringement, one party has to actively engage in every single
3 step or method claim. If, however, a party has an agency
4 relationship with another, in certain limited circumstances,
5 the Court has allowed that to be a direct infringement.

6 For indirect infringement to occur, there must be at
7 least one direct infringer. That is to say that someone must
8 be practicing the steps.

9 THE COURT: Are you saying joint infringement doesn't
10 apply to indirect infringement?

11 MS. HUGHEY: In theory you could have two parties
12 engaging in joint infringement and a third party guilty of --

13 THE COURT: But on this record, is there any theory
14 of joint infringement that exists as to indirect infringement?
15 Any basis any jury could find that?

16 MS. HUGHEY: I don't believe so, Your Honor, no.

17 THE COURT: Why?

18 MS. HUGHEY: On this record, there's no -- on this
19 record, ePlus could not prove joint infringement because it
20 hasn't demonstrated that there is an agency relationship
21 between Lawson and any third party.

22 THE COURT: I thought you said, though, that that
23 made it direct infringement.

24 MS. HUGHEY: That's right. Joint infringement is
25 direct infringement.

1 THE COURT: I understand, but I also asked you,
2 because some of the instructions you all tendered suggested
3 that joint infringement an application in the indirect
4 infringement context. Are you contending that or not?

5 MS. HUGHEY: I don't believe that we're contending
6 that the joint infringement is the same thing as indirect
7 infringement or that it has applicability to indirect
8 infringement. It's possible that --

9 THE COURT: So the joint infringement doesn't -- do
10 you understand it doesn't even apply to indirect infringement?

11 MS. HUGHEY: I think it could apply to indirect --

12 THE COURT: On the facts of this case.

13 MS. HUGHEY: Correct, Your Honor. Correct. As I was
14 saying, Lawson does not control that vendor or contractually
15 obligate them to do anything. Likewise, Lawson does not have
16 control over what its customers do, as they act for their own
17 benefit and under their own control. Because there is no
18 single direct infringer, there can be no indirect infringement
19 either.

20 THE COURT: All right.

21 MS. HUGHEY: I have two more points, Your Honor.
22 Unless you have a question? With respect to the unaccused
23 systems, Lawson has provided no basis for a reasonable jury to
24 find for ePlus with respect to certain unaccused systems.

25 THE COURT: If it's not accused, what do I care? I

1 don't need to rule on an unaccused system.

2 MS. HUGHEY: They were potentially accused in the
3 pretrial order, but then during trial, it became clear they
4 were no longer accused. I am not sure ePlus would actually
5 oppose this part of the motion.

6 THE COURT: What are you talking about, unaccused?
7 Looking for the approvals on the purchasing agent?

8 MS. HUGHEY: I'm sorry, Your Honor. Certain systems
9 -- I think you remember that Dr. Weaver accused five systems of
10 infringing, and then he went through claim by claim, but he did
11 not accuse every system of accusing every claim.

12 THE COURT: You don't need judgment on any system
13 that they don't have any evidence on. Is there anything else?

14 MS. HUGHEY: One final thing. I don't believe that
15 ePlus is asserting the doctrine of equivalents infringement,
16 but I'd like to make a record here that we move for judgment as
17 a matter of law to the extent that they would suggest
18 otherwise.

19 MR. ROBERTSON: We will stipulate we haven't made the
20 doctrine of equivalents argument with respect to the
21 infringement.

22 MS. HUGHEY: That's all I have, Your Honor. We'd be
23 willing to brief any of these issues further.

24 THE COURT: Thank you.

25 MR. ROBERTSON: Thank you, Your Honor. I'm sure you

1 can appreciate that just like Your Honor, I've heard those
2 arguments for the first time right now, so let me see if I can
3 try and track them for you and answer any questions you might
4 specifically have.

5 We think we brought forth ample evidence of both
6 direct infringement and induced infringement --

7 THE COURT: Do you take the view that joint
8 infringement applies in the indirect infringement claim?

9 MR. ROBERTSON: I think there can be a joint
10 infringement scenario in which Lawson aids, assists, abets,
11 encourages their customers to indirectly -- to induce
12 infringement, and that would be a situation, Your Honor, for
13 example, if Your Honor concludes --

14 THE COURT: What is the difference between that and
15 contributory infringement then? I think it's very confusing to
16 the jury to have this joint infringement issue in the case in
17 the indirect infringement issue, and I don't even understand
18 how it would apply on the facts of the case anyway.

19 But forget about the facts of the case. Is there any
20 case that holds joint infringement applies in indirect
21 infringement charges?

22 MR. ROBERTSON: I haven't seen one specifically, Your
23 Honor.

24 THE COURT: I haven't either. Never heard of it.

25 MR. ROBERTSON: But, you know, if you want to ask me

1 theoretically can that be the case, absolutely. Do you want me
2 give you a scenario in the facts of this case in which it could
3 be occurring, I'm happy to do so.

4 THE COURT: What is your theory? Are you pressing
5 joint infringement in the indirect infringement context? If
6 you aren't, I don't need to hear anything further about it, and
7 since it's such a rare animal, even if it's not in the extant
8 one or ever was, just fish or cut bait.

9 MR. ROBERTSON: Your Honor, this joint infringement
10 position is a defense that Lawson is taking because they are
11 arguing that they don't have control or direction over their
12 punchout partners. Now, I think we marshalled the substantial
13 evidence that showed that is not the case, but how could an
14 indirect or induced infringement scenario --

15 THE COURT: They don't direct claims like that. Do
16 you claim there is a joint infringement under the indirect
17 infringement case you are presenting? I think that you don't.
18 I think they, in fact, then -- they may say, well, even if its
19 joint infringement, you are saying we don't have control, but
20 in the first instance it's you who presses the point, so do you
21 or do you not have a joint infringement claim under your theory
22 of indirect infringement, or are you going to give it a mercy
23 killing?

24 MR. ROBERTSON: Your Honor, I don't want to give it a
25 mercy killing because it shouldn't be killed, and let me

1 explain why that's the case. Let me give you a scenario with
2 where there can be an induced infringement in a joint
3 infringement -- direct infringement case. You have --

4 THE COURT: Huh-uh. I didn't ask about direct.

5 MR. ROBERTSON: Yes, we are pressing an indirect
6 infringement that could involve joint infringement, direct
7 infringement.

8 THE COURT: What is that?

9 MR. ROBERTSON: What is it?

10 THE COURT: Yes.

11 MR. ROBERTSON: It is inducing someone, perhaps more
12 than one party, to actually commit the direct infringement.

13 THE COURT: Why isn't that induced infringement?

14 MR. ROBERTSON: It is --

15 THE COURT: -- under indirect infringement, and why
16 isn't it then joint infringement under direct infringement?

17 MR. ROBERTSON: I agree with Ms. Hughey that joint
18 infringement is a direct infringement theory.

19 THE COURT: That's all I'm asking you.

20 MR. ROBERTSON: Okay. Then I'm sorry. I
21 misapprehended Your Honor's question, but Ms. Hughey and I
22 agree joint infringement is direct infringement.

23 THE COURT: The instructions that both of you
24 tendered did not distinguish, and some of the arguments that
25 were being made suggested to me that you were pressing a theory

1 of which I was unaware, and now that we've gotten that
2 straight, what's the joint infringement theory under the direct
3 infringement claims? In this case on this record.

4 MR. ROBERTSON: Well, joint infringement sometimes is
5 called divided infringement when a defendant wants to say that
6 they are not directly controlling the actions of another, and
7 the way I understood Ms. Hughey's argument to be is they say,
8 we really don't know what these punchout trading partners are
9 doing that we have. Once you go to their website, it's all up
10 to them. So the evidence turns on whether or not there's
11 direction and control with respect to what's been proffered so
12 far before the Court.

13 THE COURT: Direction and control of whom?

14 MR. ROBERTSON: The third party punchout partners,
15 Your Honor, their trading partners that they either have
16 informal agreements with or formal agreements with in which
17 they -- I think one of the intentions of the formal agreements
18 is we're going to do this jointly. We're going to make a joint
19 effort, combine our products.

20 I asked Mr. Lohkamp, do you do that for the mutual
21 benefit of both companies. He said absolutely. We heard
22 evidence that the Lawson system controls the punchout process,
23 that they provide the protocols. Mr. Lohkamp even called it
24 the handshake that lets you get there. Dr. Weaver testified
25 you can't -- you don't even leave the Lawson system, and when

1 you go to the website, there was that special URL that showed
2 you had never left the Lawson system, that you are not at a
3 commercial website. You are at a website that has been
4 especially prepared for Lawson's customers using the
5 procurement punchout.

6 The customer has to say to Lawson, we want you to set
7 this up. We'll tell you who our punchout partners are. Lawson
8 then goes out, they either contract with them, or they make an
9 arrangement if the protocols work, and we actually demonstrated
10 the punchout process.

11 So the argument becomes, boils down to this: Well,
12 when you finally punched out, but you never left the Lawson
13 system, you then can search content provided by the supplier,
14 for example. But, of course, that's exactly why the whole
15 arrangement was set up, for their joint effort and mutual
16 benefit.

17 So we think, quite frankly, Your Honor -- there's a
18 recent decision called *Akamai* that came down from the Federal
19 Circuit perhaps two weeks ago, and it was a situation of joint
20 infringement, and we think if there were ever a situation that
21 joint infringement applied through a factual scenario, it is
22 this case. This case is the poster child for joint
23 infringement because of the relationship that Lawson has with
24 its punchout trading partners.

25 You will remember, even when we were looking at the

1 demonstration that Dr. Weaver did a punchout, to go out and get
2 the data and retrieve it, it still was branded with Lawson.
3 You were framed within a Lawson website, and as Dr. Weaver
4 said, you never left.

5 So you can't even do the punchout process without the
6 Lawson software. That's the first step. And then once you do
7 do it, you are there, and you are retrieving the data, and you
8 are putting it in your requisition, and you are building your
9 purchase order just as the claims described.

10 So that, Your Honor, I think is the only scenario in
11 which I would think the joint infringement could arise at all
12 if you even needed to go there, and I think in our papers we
13 would argue first that this is not a situation of joint
14 infringement, but even if it were, that it's been satisfied by
15 the evidence that's been presented here.

16 And so how do you induce that direct infringement
17 which I think we're in agreement is joint infringement? Lawson
18 induces it by first providing the functionality in its punchout
19 software to do that. Second, it induces it by providing their
20 customers with the guides, the implementation, the
21 installation, the services. They provide all of that kind of
22 evidence is evidence that they are abetting and assisting.

23 So we think that the facts of this case, particularly
24 Dr. Weaver who went through, you will recall, that eight-step
25 protocol you need to do in order to set up this communication

1 links, and no one has ever denied or challenged the fact that
2 it's Lawson that sets up this communication protocol and
3 permits this process to happen, and Mr. Lohkamp even conceded,
4 you can't do it without the punchout procurement software.

5 So when you do that, you are inducing the direct
6 infringement by the customers performing those steps of the
7 method claims when they go through and they select catalogs
8 which Dr. Weaver showed in his demonstration. They search
9 those catalogs, they match items, they build a requisition, and
10 they build and generate the purchase order.

11 THE COURT: Thank you.

12 MR. ROBERTSON: He showed how to do it both from an
13 internal catalog database and -- which Lawson can set up in the
14 customer's software, and an external catalog database which is
15 the punchout.

16 THE COURT: Thank you. Is there -- is this record
17 now complete on the issue of willful infringement?

18 MR. ROBERTSON: Of what, sir?

19 THE COURT: Is the record complete on willful
20 infringement?

21 MR. ROBERTSON: I do not believe so. I thought we
22 were going to reserve some of those things.

23 THE COURT: What are you going to do and when are you
24 going to do it?

25 MR. ROBERTSON: Well, I thought we had bifurcated

1 willful infringement. I contemplated that Your Honor might
2 want to have a short hearing, perhaps a half a day, as to
3 evidence on that.

4 THE COURT: Could we use Monday or Saturday?

5 MR. McDONALD: Let me go back and --

6 THE COURT: Do you really have a case of willful
7 infringement here?

8 MR. ROBERTSON: I think one of the things, Your
9 Honor -- certainly didn't contemplate that I was going to have
10 to put on evidence in this portion of the case because I agreed
11 to bifurcate that, but let me address that specifically.
12 Number one, Lawson --

13 THE COURT: The point is, if you haven't -- when are
14 you going to put on the evidence of willful infringement, and
15 basically what is it going to be if it's not already in? The
16 question is, what did you do? Did you decide to put in what
17 you had and let me decide it? We never did decide whether we
18 were going to have a hearing. I was going to have to decide
19 the issue, but we never did decide how we were going to do it
20 unless my memory fails.

21 MR. ROBERTSON: Your Honor --

22 THE COURT: Do you have additional evidence on
23 willfulness that isn't in the record at this time? That's all
24 I want to know.

25 MR. ROBERTSON: Let me think. I think there's

1 evidence that Lawson had an opinion of counsel that it obtained
2 early on and refused to turn over that opinion and stood on the
3 privilege. While there is not an adverse inference the jury
4 can draw --

5 THE COURT: The jury doesn't draw that. I'm drawing
6 it.

7 MR. ROBERTSON: Well, I think if the Court wasn't
8 aware, there was an opinion early on that was given --

9 THE COURT: Didn't you all agree I did willfulness?
10 Isn't that what you agreed?

11 MR. ROBERTSON: Yes, sir.

12 THE COURT: All right. I wanted to make sure --

13 MR. ROBERTSON: In addition to the evidence that
14 there's been nothing done by Lawson since they've been put on
15 notice of this lawsuit in May 2009, no redesign, no good
16 faith effort --

17 THE COURT: Mr. Robertson, I'm not asking you to
18 argue. I'm asking do you have any other evidence that you
19 haven't put on. You tell me about willfulness. You tell me
20 that there's an opinion of counsel that they declined to
21 produce and stood on the privilege. Can the finder of fact
22 draw from that an inference of willfulness?

23 MR. ROBERTSON: I think the finder of fact can
24 consider that in the totality of the circumstances which is the
25 test for willfulness.

1 THE COURT: Do you have any case that says that?

2 MR. ROBERTSON: Your Honor, I'll have to go and
3 check. One of my colleagues reminded me of a case that I have
4 not actually read and I don't want to represent to the Court.

5 THE COURT: It's a good thing not to argue a case you
6 haven't read.

7 MR. ROBERTSON: I didn't want to do that.

8 THE COURT: Unless you want me to decide on the bases
9 of the cases I have read.

10 MR. ROBERTSON: No, Your Honor. In fairness, I came
11 here today to try and prepare to argue this. I was not
12 thinking in terms of the representation of the Court what the
13 willfulness case should be.

14 I think you've heard some evidence that under the
15 totality of the circumstances, you could consider as being
16 evidence that would warrant a conclusion of willful
17 infringement. I think there would be some additional evidence.
18 Right now what comes to mind--

19 THE COURT: We'll deal with that later. Thank you.

20 MR. ROBERTSON: Do you need to hear any --

21 THE COURT: No, thank you. The motion did not relate
22 to willfulness, so I'm not going to deal with it. I was just
23 asking you a question while you were standing up there.

24 MR. ROBERTSON: Thank you.

25 MS. HUGHEY: Your Honor, if I may, with respect to

1 the issue of joint infringement, ePlus's counsel suggested that
2 it was a defense, and that's not the case. ePlus always has
3 the burden of proof on the issue of infringement, and it can
4 pursue that burden of proof either through the direct
5 infringement --

6 THE COURT: Ms. Hughey, what he said was, he's not
7 contending it's joint infringement, you are, saying that if it
8 was any kind of infringement it's joint infringement and you
9 win -- and he wins -- because you haven't any evidence of the
10 elements of it, I believe; is that right, Mr. Robertson, or did
11 I miss it?

12 MR. ROBERTSON: My argument, Your Honor, was whether
13 it's direct infringement just by Lawson committing all the
14 steps or having the system, or whether it's joint infringement,
15 we win either way.

16 THE COURT: I understand that, but what you said was
17 we don't think it's joint infringement, but even if it is, we
18 win. The predicate of that sentence is, we don't think it's
19 joint infringement, and that's what I am trying to ascertain.

20 You said it was they who injected that question, the
21 defendants injected that issue in, and you don't think it's
22 joint infringement, but even if it is, you win. Is that your
23 position or not?

24 MR. ROBERTSON: That's our position, Your Honor.

25 THE COURT: Okay, thank you very much. Now you know

1 the framework.

2 MS. HUGHEY: Okay. Well, with respect to that then,
3 if ePlus is not asserting joint infringement as a method to
4 prove infringement, then I think it's going to be easy --

5 THE COURT: Then you are not asserting that this is
6 any joint infringement issue for me to decide; is that right?

7 MS. HUGHEY: I'm moving for judgment as a matter of
8 law --

9 THE COURT: No, you are not asserting that there's a
10 joint infringement issue for me to decide; right?

11 MR. ROBERTSON: Who are you pointing to, Your Honor;
12 me?

13 THE COURT: Ms. Hughey.

14 MS. HUGHEY: ePlus has the burden of proof on
15 infringement.

16 THE COURT: I understand that, but you need to answer
17 the question that I asked. You are the one who got up here and
18 argued it. He says he doesn't content that it's joint
19 infringement, but even if there is, he wins.

20 Now, I understand your argument to be that if there's
21 any infringement that's been available to go to a jury, it is
22 joint infringement and you win because the elements haven't
23 been made out for joint infringement. That was your argument
24 as I understand it, wasn't it? Wasn't it your argument?

25 MS. HUGHEY: Yes, both there is no direct

1 infringement by Lawson alone, and there is also no direct
2 infringement by Lawson combined with another party through a
3 doctrine called joint infringement. That's what I'm saying,
4 Your Honor.

5 THE COURT: But you also are saying if they have
6 proved any infringement, directly, direct infringement, it's
7 joint, and you don't -- and you don't infringe jointly because
8 they haven't made out the elements of a joint infringement
9 claim in a direct infringement context; right?

10 MS. HUGHEY: I don't think I said that they proved
11 infringement in any context, Your Honor.

12 THE COURT: I didn't say that they had. Listen
13 tight, as John Wayne used to say, soldier. If -- you are
14 saying, we don't think that there's any infringement at all.

15 MS. HUGHEY: Yes.

16 THE COURT: But if they've proved any kind of
17 infringement, then the best it could be is joint infringement,
18 and even if that's what they're going for, they lose because
19 they haven't put out the evidence, they haven't made out the
20 elements of that. Isn't that what you are saying?

21 MS. HUGHEY: That's fair, Your Honor, yes. With
22 respect to the issue of joint infringement, counsel references
23 this *Akamai* case, and I can give you the cite. It's a very
24 recent case. It doesn't have the F Reporter yet. 2010, U.S.
25 App. LEXIS 25825. That's a recent Federal Circuit case.

1 With respect to that case, what the Federal Circuit
2 found was that there was no joint infringement because the
3 accused infringer did not perform all of the steps of the
4 accused claims, and there was no evidence that the accused
5 infringer's customers performed the remaining steps as agents
6 of the accused infringer.

7 In that case, the patents related to a system and
8 method for allowing a content provider to outsource the storage
9 and delivery of discrete portions of its website content.

10 THE COURT: Let me ask you something. Since he's
11 saying, he's not arguing there's any joint infringement, why
12 are you bringing to me an issue of joint infringement in the
13 first place? Why don't you just say, he has agreed there's no
14 issue of joint infringement, and so we don't have to discuss
15 that any further? In other words, I have cornered the fox in
16 his den. And he has folded.

17 MS. HUGHEY: Your Honor, I would like to say that I
18 have cornered the fox in his den, and he has folded.

19 THE COURT: Thank you.

20 MR. ROBERTSON: Your Honor, can I respond to that?

21 THE COURT: Don't get out of the den, and it's her
22 motion, so she gets the last word. Don't try to get out of the
23 den.

24 MR. ROBERTSON: We're only talking about this
25 punchout scenario here.

1 THE COURT: No, no. That's like -- you just folded
2 over here.

3 MR. ROBERTSON: Your Honor --

4 THE COURT: Not only did you fold, you induced her to
5 quit.

6 MR. ROBERTSON: But the joint infringement context
7 didn't come out in the initial opening argument outside of the
8 context of what the third party punchout partners did.

9 Now, did they do anything? Yeah, they provided the
10 catalog content, and they'll let you search a site and it all
11 comes back to Lawson. So there are two steps that they have to
12 perform.

13 Now, they can even be inducing those steps by the
14 facts that I already have adduced to the Court. They can be
15 inducing those parties to do it, or they can be doing under
16 their direction or control. So as I say, Your Honor, I think
17 we win on alternative theories of --

18 THE COURT: But you didn't have that theory, and you
19 told me you didn't have the joint infringement theory under the
20 direct infringement --

21 MR. ROBERTSON: I don't think we need to -- first of
22 all, I want to make clear we're talking -- I was talking only
23 about punchout, because there are method claims that are
24 performed by the customers when Lawson provides them with
25 features and functionality, the five software --

1 THE COURT: You are through. You don't have any
2 joint infringement claim under anything. That's what you told
3 me, and that's it. Sit down. Have a seat. That's it. I
4 mean, there's a limit to what I have, what I can deal with here
5 and what is allowed, and you just transcended it by saying
6 that. I don't have to rule on that now. It's already been
7 dealt with by way of a concession as to the Rule 50 motion,
8 there is -- and there is no doctrine of equivalents claim
9 notwithstanding what some of the instructions that were
10 tendered say.

11 So to the extent the doctrine of equivalents is
12 asserted on any claim, the motion for judgment as a matter of
13 law is granted, but I believe they said they don't have the
14 claim, so the rest of the issue is whether there is, as to any
15 of the patents, claims of the patents-in-suit, a reasonable
16 basis for a reasonable jury to find patent infringement, and
17 there is under theories of both direct and indirect
18 infringement, and the motion for relief under Rule 50 is
19 denied. All right? Are we ready for the jury?

20 No? Yeah. You have to rest in front of a jury.
21 Read the stipulations, and let's go.

22 MR. ROBERTSON: We have these exhibits in binders.
23 We're bringing the stipulations, and then I'll be ready.

24 THE COURT: First witness then is whom, Mr. McDonald?

25 MR. McDONALD: Mr. Lawson will be our first witness,

1 Your Honor. I just want to clarify, I think -- we know you
2 wanted to get the transcripts on the Markman rulings and
3 things, and I'm not sure when you actually want to hear that.
4 I don't know they are ready yet.

5 THE COURT: You did get together and what? I'm
6 having trouble hearing you.

7 MR. McDONALD: I'm sorry. The parties did get
8 together over the lunch hour and combined the pages that they
9 thought were appropriate to provide to the Court. I don't
10 think the Court's actually got a copy of the combined version
11 of that. I think they are working on it, so obviously we don't
12 have it at this point.

13 I just wanted to give a heads-up, because I wasn't
14 sure when Your Honor wanted to address that issue. Obviously,
15 you have to read the materials --

16 THE COURT: When do I have to address it?

17 MR. McDONALD: It's actually going to come off to
18 some extent with respect to Mr. Christopherson's testimony, so
19 it won't be too long.

20 THE COURT: Is he the second witness?

21 MR. McDONALD: Yes.

22 THE COURT: Do you have a joint version that I can
23 have?

24 MR. McDONALD: Let me check, Your Honor, if I may. I
25 see some bodies moving at this point, Your Honor. I think

1 they're working on it. I don't know that it's ready yet, but
2 I'll let you know.

3 THE COURT: Go back there and talk to them and find
4 out.

5 MR. McDONALD: I'm told it could be ready in ten
6 minutes, Your Honor. I think that might be a little
7 aggressive.

8 THE COURT: I haven't got what I need to rule, so I
9 don't think it's a good idea to rule. Can we have the
10 witness --

11 MR. STRAPP: Your Honor, a few housekeeping matters.
12 For the record, during the Frank deposition video, the exhibits
13 that were referenced by Mr. Frank were Plaintiff's Exhibits
14 150, 153, 154, 155, 156, 157, 173, and 129, and the excerpted
15 portions of the deposition transcript itself are Plaintiff's
16 Exhibit 517 --

17 THE COURT: My copy of it doesn't have an exhibit
18 number on it.

19 MR. STRAPP: That's correct, Your Honor.

20 THE COURT: 517.

21 MR. STRAPP: That's correct. And Your Honor --

22 THE COURT: You need to make sure you get one.

23 MR. STRAPP: There were a couple of typographical
24 errors on the transcripts of the depositions of Ms. Oliver and
25 Mr. Matias. By agreement of the parties, those have been

1 corrected, and we have corrected versions of those deposition
2 transcripts to hand up to Your Honor.

3 THE COURT: Let me have them. You have to hand the
4 clerk the originals.

5 MR. STRAPP: This is -- Ms. Oliver's corrected
6 transcript is Plaintiff's Exhibit 518 replacing the original
7 Plaintiff's Exhibit 518. I'm sorry. Plaintiff's Exhibit 520
8 this is the corrected version of Mr. Matias's deposition
9 transcript.

10 THE COURT: Let's do this: Let's call 518-A -- get
11 that back and mark it. Mr. Neal, mark 518 518-A and 520, the
12 one he just handed you 520-A, and that will be the corrected
13 versions. All right, folks, that way we will get them
14 straight.

15 MR. STRAPP: Your Honor, with respect to one of the
16 Frank exhibits that was referenced, you will recall that there
17 was an issue that came while it was being played. Although
18 that exhibit had never been objected to during court, Lawson
19 suggested that they now did have an objection to part of the
20 document, and they're asking it be redacted.

21 I've agreed that the parties can meet and confer with
22 that as soon as we have a minute after the day is over in
23 court, but we haven't resolved that issue yet.

24 THE COURT: I appreciate your confidence in my
25 memory, but I don't remember, so I'll let you all deal with

1 that, let you solve it by the end of the day. All right, are
2 we now ready -- and you have the stipulations to read; right?

3 MR. ROBERTSON: I have a handful of stipulations,
4 Your Honor, to read, and I'll rest.

5 THE COURT: All your exhibits you are going to use
6 you've gotten done; right?

7 MR. ROBERTSON: Exhibits that Lawson is going to use?

8 THE COURT: You. Remember I told you any exhibits
9 that you don't use is not going to be part of the record, and
10 now we have a complete list of exhibits that are part of the
11 record, and Mr. Neal has got that list, and he'll give you a
12 copy of it and you can deal with that. That way the record
13 will not be as unwieldy as --

14 MR. ROBERTSON: I just might suggest, Your Honor, to
15 the extent that we use some exhibits during the rebuttal case
16 or in response to Lawson's non-infringement case, we might
17 be moving some of those --

18 THE COURT: That is a different animal.

19 MR. ROBERTSON: Okay.

20 THE COURT: Just don't get animated to move all your
21 paper in just because of that.

22 THE CLERK: Will they have a chance to review this
23 list to make sure --

24 THE COURT: Yes, we don't want a *Lentz* situation.

25 THE CLERK: Because on the video depositions, they

1 were nilly-willy sometimes. I'll give you a copy of those so
2 you can look at it.

3 MR. ROBERTSON: Your Honor, could I ask --

4 THE COURT: What you need to do is give -- as I
5 understand it, you've given me the list of exhibits by
6 Plaintiff's Exhibit number that were used in 517, 518, which is
7 now 518-A, and 520. I don't have any -- or 520-A. I don't
8 have any PX numbers used in there.

9 MR. STRAPP: There were no exhibits referenced.

10 THE COURT: There were none, okay. Does that take
11 care of all the depositions now?

12 MR. STRAPP: Yes, Your Honor.

13 THE COURT: On the front page of my copy, Mr. Neal,
14 are the exhibits of 517 and 518-A. You can use those and then
15 return them to me. All right.

16 MR. ROBERTSON: Your Honor, could I just ask, before
17 I read the stipulated facts if Your Honor could explain to the
18 jury what stipulated facts are.

19 THE COURT: I do always.

20 MR. ROBERTSON: Thank you.

21
22 (Jury in.)
23

24 THE COURT: All right, I'm sorry to do this, but with
25 these questions, I think I need to have copies made, give them

1 to the lawyers, because it may affect what's going to happen
2 next. ePlus is on the verge of resting its case which means
3 that that will be the end of the plaintiff's case. I think in
4 fairness, before that's done, since you have presented these
5 questions to me, I'm going to present them to the counsel.

6 So what that means is that we need to ask you to get
7 some more aerobic exercise and go back into that room. Sorry.
8 That way I may need to talk to with them, and they may need to
9 do something else. For your information, I have been told that
10 you all have reached a unanimous verdict that you do not want
11 to work on Monday, and that's fine. You will be pleased to
12 know that the lawyers are delighted.

13 I, on the other hand, am going to be working on
14 Monday anyway. Go right ahead. If you'll go back. I am sorry
15 to do this to you, but I think will be a more orderly procedure
16 and fair to everybody.

17
18 (Jury out.)
19

20 THE COURT: Somebody has some interesting questions.
21 And if you all had been ready just as soon as lunch was over,
22 we probably wouldn't have got them. We gave them time, so Ms.
23 Haggard is making copies. One of the questions is how many
24 discovery orders were involved in the -- whatever question it
25 was.

1 Another one is why didn't Lawson get a patent on its
2 S3 system and is Lawson's system prior art, and I've forgotten
3 the first one, but I think given it came to me at this stage of
4 the trial, it was only fair to give both of you the information
5 so you at least know what the jury is dealing with, because we
6 told them as to Court Exhibit 1 that that would come up later
7 in your case, I believe it was, Mr. McDonald, wasn't it?

8 MR. McDONALD: The Lohkamp questions you mean?

9 THE COURT: Do you have Court Exhibit 1, Mr. Neal?

10 MR. McDONALD: Those were the questions that related
11 to Mr. Lohkamp's testimony.

12 THE COURT: Yes.

13 MR. McDONALD: We were going to bring him back, and
14 when he was re-called, we'll address those.

15 THE COURT: Right. There's a Court Exhibit 2
16 already, isn't there?

17 THE CLERK: Yes, sir, Your Honor.

18 THE COURT: So this will be Court Exhibit 3. The
19 first question, is there a duty/requirement for an entity to
20 perform due diligence and search for patents on
21 products/services, et cetera, before the entity markets and
22 sales their products/services, et cetera is the first question.

23 Second, why didn't Lawson file for a patent on its S3
24 system? Can it be considered prior art if the patent has not
25 expired?

1 Three, can one contact the U.S. Patent Office for
2 existing patents (search)?

3 Who decides if a patent is valid? Is the U.S. Patent
4 Office notified and their opinion sought if the validity of a
5 patent is questioned?

6 How many orders to compel were ignored (re discovery,
7 document production)?

8 All right, earn your money, ladies and gentlemen.
9 Let's take them one at a time starting with number four.

10 MR. ROBERTSON: Starting with number four.

11 THE COURT: That's the last one. How many orders to
12 compel were ignored. I think the answer to that is, that is
13 not something that is -- about which you need to concern
14 yourself.

15 MR. McDONALD: Your Honor, the problem is, Mr.
16 Robertson asked the question and implied we had ignored a court
17 order to compel regarding implementation which is not the case,
18 and I think we need to correct that record at some point along
19 the way here. So I think this question shows --

20 THE COURT: How are you going to correct the record?

21 MR. McDONALD: Well, I think the jury should be
22 instructed that there were no orders that were violated by
23 Lawson regarding implementation or anything else. I think the
24 question was specifically about discovery regarding
25 implementation, and there's absolutely no noncompliance with

1 any court order on that in this case, but Mr. Robertson asked a
2 question that implied that, and I think we need to correct that
3 record and say there was no such order ignored.

4 THE COURT: When you say we need, do you mean I need
5 to say that?

6 MR. McDONALD: I think that would be the appropriate
7 remedy to this question.

8 THE COURT: I have to rule on that.

9 MR. ROBERTSON: I asked Dr. Weaver if he was -- since
10 he reviewed all the interrogatory answers, whether or not there
11 was evidence that was supplied by Lawson on a
12 customer-by-customer basis as to all the modules that were
13 implemented and whatnot. I believe his testimony was there was
14 one, and I asked him, did you have the information with respect
15 to that in that interrogatory answer.

16 That is the very interrogatory answer that Your Honor
17 ordered a motion to compel on and said if they refused to
18 answer it, that evidence will not be used for basis for
19 non-infringement. Now I'm paraphrasing what Your Honor said.
20 The language was a little more colorful than that, but I
21 thought it was entirely appropriate to ask Dr. Weaver if he had
22 been provided with all the information he felt necessary,
23 including the interrogatory answers that dealt with this
24 implementation issue and which Your Honor had granted a motion
25 to compel, and --

1 THE COURT: Do you have that in the question?

2 MR. ROBERTSON: I asked him the perforatory questions
3 if he, in fact, reviewed the interrogatories and if he found
4 that Lawson had provided them with the information on a
5 customer-by-customer basis, and he said -- he didn't have that
6 information, it wasn't provided. That was --

7 THE COURT: That's not the same thing as the motion
8 to compel. You didn't even recite the motion to compel in your
9 question as you just recited it. My recollection is a little
10 different than all that. My recollection is that it was Dr.
11 Weaver who said he had understood there had been a motion to
12 compel and it hadn't been provided, but it may be that it came
13 up in sort of a redirect. So who has -- does anybody have a
14 transcript?

15 MR. McDONALD: Yes, Your Honor, I have it right here.
16 Let me get the page number here. I can't -- is it page 434 of
17 the PDF file? Page 916. Here's the question. Were you aware
18 that ePlus asked the Court to compel Lawson to provide that
19 information.

20 Yes.

21 And were you aware that the Court granted that motion
22 to compel?

23 Yes.

24 And are you aware that Lawson still failed to provide
25 that information on a customer -- and then I objected. I said,

1 this is outside of the record, and there's no record of a
2 failure to comply with the Court's order. And the Court said,
3 well, it certainly is a relevant issue based on your
4 questioning, but I'm not sure this is the appropriate place to
5 deal with it. Mr. Robertson, I'll take that up at another
6 time.

7 This gave the jury a misleading impression, Your
8 Honor, that we had failed to comply with a Court order. There
9 is no record of that regarding the implementation or anything
10 else, and so that has to be corrected.

11 I think the fact the jury asked this question shows
12 that that's the impression that was left here, and we do ask
13 the Court to give the instruction that there was no order to
14 compel that Lawson ignored.

15 THE COURT: Isn't this the subject of the brief that
16 was filed, Mr. Robertson?

17 MR. ROBERTSON: Yes, sir. That's why I followed up
18 with that brief.

19 MR. McDONALD: Which brief is that?

20 THE COURT: It says, plaintiff ePlus, Inc.'s brief in
21 support of motion to preclude evidence or argument of
22 non-infringement due to defendant's failure to provide
23 discovery relating to customer-specific implementations of
24 accused product modules, and I said I thought you all were
25 going to research that and give me a paper on it, and it, in

1 essence, establishes that interrogatory -- ePlus interrogatory
2 24 called for that information, that there was communication of
3 it, and on March 25th of 2010, there was a letter sent to the
4 Court asking that I address it during a March 26th conference
5 call, and they asked me to rule that you were deficient because
6 you didn't include any information about the implementation of
7 the accused Lawson software modules on a customer-by-customer
8 basis, and the Court ordered Lawson to provide the
9 implementation -- information sought by ePlus citing the
10 transcript.

11 The Court is -- the remark is attributed to the
12 Court, answer the interrogatory, and then the Court stated, and
13 if somebody doesn't give you the information in discovery that
14 you asked for that's pertinent to their defense, they want to
15 raise it. You say, I want to move -- you say, I want to move
16 to strike the defense because they said we weren't entitled to
17 this and they didn't give it to us, and then, wham, the door
18 shut on it.

19 It's further -- later, in a written order, I said,
20 you should supplement your responses to interrogatories 23 and
21 24 by April 2, 2010 and that you didn't provide the
22 customer-by-customer information thereafter. Now, that's what
23 the brief says, in essence.

24 MR. McDONALD: Mr. Schultz has been dealing --

25 THE COURT: So there's a court order that tells you

1 to do it, a verbal order and written order that gives you a
2 date by which to do it, and you didn't do it. So there was a
3 motion to compel and you didn't do it, according to the brief.

4 Now, that's the way I read it. Is that basically the
5 position, Mr. Robertson, that is set forth in this brief?

6 MR. ROBERTSON: Yes, sir, and we did follow up with a
7 letter after that, and we said, we're not filing any other
8 motions because we understand Your Honor's order to be
9 self-executing.

10 MR. SCHULTZ: Your Honor, one modification to the
11 facts, and that is that there was an interrogatory number 24.
12 Lawson provided a response to interrogatory number 24. There
13 was a series of meet-and-confers between counsel regarding the
14 substance of interrogatory number 24.

15 That ultimately led to the conversation with Your
16 Honor and the Court order regarding supplementation of
17 interrogatory number 24. There was an agreement between
18 counsel to extend the time to respond to interrogatory number
19 24. Thereby Lawson did, on April 8th, 2010, fully respond to
20 interrogatory number 24.

21 Here is a key fact that was not put in ePlus's brief.
22 The parties then had, on April 16th, a meet-and-confer
23 regarding the scope of Lawson's response to interrogatory
24 number 24. Thereafter, ePlus followed up with a correspondence
25 detailing the meet-and-confer conference. Interrogatory 24 was

1 not on that correspondence that followed up with that.

2 The only thing that we can take from that is that
3 there was no further dispute regarding interrogatory number 24.
4 Then, at the close of discovery, Lawson further supplemented
5 interrogatory number 24.

6 Also, if Your Honor recalls, the scheduling order in
7 this case requires that all discovery motions be completed by
8 the close of discovery. If ePlus had an issue with respect to
9 the response that Lawson had with respect to interrogatory
10 number 24, that should have been raised at that time, not at
11 trial as an ambush.

12 THE COURT: No, Mr. Schultz. If, in fact, they
13 wanted to keep it out, they could keep it out if you violated
14 the Court order. So the question is, did you violate the Court
15 order. That's the issue. The only way I have to answer
16 that -- first, those questions went un-objected to. There were
17 two of them. I've forgotten exactly what they were.

18 It was the third question that had that information
19 in it that was objected to, and I said I would deal with it
20 later, but there were two questions that were not objected to,
21 and I can't deal with -- what I would like to have done is to
22 have had you all deal with it and bring it up in some other
23 time after the question had been asked, but I can't deal with
24 it without seeing the answers which you say comply with the
25 Court order.

1 And so if you have those -- the only thing I can do
2 is read them. Do you have them?

3 MR. SCHULTZ: Your Honor --

4 THE COURT: The answer is -- I'm sorry. I had an
5 indefinite pronoun. Do you have the answers that you say you
6 provided, I think you said on April 8th, but I'm not sure.

7 MR. SCHULTZ: April 8th is correct, Your Honor, and
8 then there was a further supplementation of those answers at
9 the end of discovery. I have them on my computer, Your Honor.
10 I don't know -- I don't have a hard copy of those. I could get
11 a printout of that for Your Honor during a break, but I don't
12 have them right now.

13 MR. ROBERTSON: Your Honor, there is --

14 THE COURT: Do you have the answers available?

15 MR. ROBERTSON: I have a supplement of May 18 that is
16 Exhibit 11 to the brief. I don't know if we have --

17 THE COURT: Do you have the whole thing? Did you
18 cite the April 8th as exhibits to the brief?

19 MR. ROBERTSON: I believe we cited the last
20 supplement. I thought it included -- when they supplement,
21 they would just add additional information. I thought it
22 included --

23 THE COURT: Wait just a minute. We're going to get
24 our copy of that. You must remember, we don't keep everything
25 out here on the bench. Otherwise, I wouldn't be able to enjoy

1 the view.

2 MR. ROBERTSON: I would just like to direct --

3 THE COURT: Wait, just wait. So your position is,
4 Mr. Schultz, is that if I read the April 8th and May 14th
5 supplements, that you will have obeyed the Court order, and it
6 was erroneous to have allowed those questions to stand.

7 MR. SCHULTZ: That is correct, Your Honor.

8 THE COURT: And that the objection was -- albeit
9 late, was sufficient to hold the matter open.

10 MR. SCHULTZ: Your Honor, that is correct, and as
11 further support for the fact that the interrogatory responses
12 were adequately responded to, if Your Honor looks at
13 Exhibit 516, Plaintiff's Exhibit 516, it's actually the exhibit
14 that the plaintiff used to show the implementation on a
15 customer-by-customer basis showing that we complied with the
16 Court's order.

17 THE COURT: I don't have -- I'm sure I have it up
18 here. I don't know which thing it was. Exhibit what, Mr.
19 Robertson?

20 MR. ROBERTSON: Sorry, Your Honor?

21 THE COURT: Exhibit 5 to the motion is what you want
22 me to look at, and that was -- let's see. The supplement says
23 Lawson incorporates its previous objections and responses
24 subject to and without waiving its objection. Lawson also
25 incorporates into this response as fully provided herein its

1 response to ePlus's interrogatory number ten.

2 Lawson further identifies the following documents by
3 Bates number as having responsive information. I'm not sure
4 that complies with the Court order because the Court order told
5 you to answer the interrogatory. It didn't tell you -- it
6 didn't leave you with any objections, and it didn't say file
7 some kind of document. It said answer it. So what I have as
8 number five is the May -- excuse me, I have to go back here.
9 May 18th response.

10 MR. SCHULTZ: Your Honor, that was a mere
11 supplementation. The April 8th response actually has a chart
12 on a customer-by-customer basis.

13 THE COURT: Just a minute. I'm asking Mr. Robertson
14 if the April 8th response is part of what you filed.

15 MR. ROBERTSON: Your Honor, I'm looking for it as an
16 exhibit, Your Honor. It wasn't included. It was an oversight
17 on my part.

18 THE COURT: It wasn't included as an exhibit to your
19 motion; is that what you are saying?

20 MR. ROBERTSON: I'm trying to find it, Your Honor. I
21 directed the motion to be prepared, Your Honor. I did not
22 actually personally prepare it.

23 THE COURT: The buck stops with you. Don't you blame
24 somebody else. That's the same thing as blaming your
25 secretary. There are too many people in this country that

1 don't believe the buck stops with them when they have the
2 responsibility. You guys have got it. It's one thing to say
3 it's not there.

4 MR. ROBERTSON: It's there, Your Honor.

5 THE COURT: Where is it?

6 MR. ROBERTSON: Exhibit Number 7.

7 THE COURT: It's perfectly all right to say it's not
8 there. We'll work it out. My copy doesn't have an Exhibit
9 Number 7. Oh, oh, oh, I'm sorry. Thank you. This jury is
10 going to think they're listening to the O.J. Simpson trial.
11 You know, you ought to have to take this apart, Mr. Robertson.
12 I don't need to go to the gym this afternoon. Let's see, the
13 response to number eight is -- let me look at it.

14 Well, there was a supplement to it. Now, all right.
15 I've read all of these now. I've read the April 8th response,
16 which is Exhibit 7 to the motion of ePlus, and Exhibit 11,
17 which is the May 18th supplement. The May 18th supplement
18 isn't worth much. The May -- or the April 8th supplement looks
19 to be a fairly full load of information of some sort, but what
20 was deficient about it, Mr. Robertson?

21 MR. ROBERTSON: Two things, Your Honor. One, I
22 counted them. There's only 36.

23 THE COURT: What's that?

24 MR. ROBERTSON: There was only 36 customers
25 identified, Your Honor.

1 THE COURT: Right.

2 MR. ROBERTSON: Mr. Lohkamp, I believe, testified
3 there were more than 300 sales of RSS alone. RSS, you'll
4 recall, has to sit on the core technology. So we can at least
5 infer from that that there were at least 300 sales of the core
6 technology. It's our understanding, based on our discovery,
7 that there were hundreds more than that when you were talking
8 about the core technology.

9 The second problem with this, Your Honor, is it
10 really is only directed to data migration; that is, who did the
11 data migration. That's the last column, responsible for
12 implementation, and if you'll see, the chart is indicative of
13 the frequency, and I'm quoting, with the customers responsible
14 for the migration of data onto the customers' systems. Several
15 of the implementations listed on the chart are upgrades from
16 previous systems and would not constitute new installation.

17 Of course, we didn't limit it only to data migration.
18 We asked for all the modules that were involved with each
19 customer, for all the customers, and we didn't distinguish
20 between upgrades, which we think still constitutes an
21 infringing system when you provide them for them and not
22 installation.

23 We subsequently -- I think we heard that there were
24 many more customers than just the 36 identified here, and this
25 does not provide us with a full answer to the interrogatory if

1 you go back and look at the specifics of the interrogatory
2 which pretty much covers the waterfront, Your Honor. I won't
3 try to read that.

4 THE COURT: It doesn't cover the waterfront, but what
5 it does cover is identify on a customer-by-customer basis for
6 each Lawson customer from May 2003 until the present, one, the
7 modules of Lawson's S3 supply chain management suite and/or M3
8 supply chain management suite and/or other Lawson electronic
9 sourcing and procurement systems and/or services which Lawson
10 has made, used, sold, offered for sale, imported, licensed,
11 implemented, maintained, and/or serviced for or to each such
12 customer, and/or which module such customer used, purchased,
13 licensed, implemented or had implemented, maintained or had
14 maintained, or serviced or had serviced, and then state for
15 certain things the dates and then the revenue. Now, read the
16 question again, Mr. McDonald.

17 MR. McDONALD: The jury's question again?

18 THE COURT: No, the question Mr. Robertson asked.

19 MR. McDONALD: Are you aware that Lawson still failed
20 to provide that information --

21 THE COURT: No, the one before that, please.

22 MR. McDONALD: Are you aware the Court granted that
23 motion to compel?

24 THE COURT: Go ahead before that.

25 MR. McDONALD: Before that?

1 THE COURT: It defines what is the topic of that
2 exchange.

3 MR. McDONALD: Did you ever receive that
4 customer-by-customer information as to their implementation?

5 THE COURT: Go back one more before that one.

6 MR. McDONALD: Okay. So you want to know what
7 information is being requested here?

8 THE COURT: Yes. What is he asking about there?

9 MR. McDONALD: This is the prior page, line 915, I
10 believe, at line six, I believe, gives context.

11 Other than the handful of deposition testimony you
12 were given from the Lawson customers, did you have access to
13 any Lawson customers to see how they were utilizing the system?
14 He was asking actually about access to Lawson customers.

15 No. In fact, I asked for that, but I never got a
16 reply.

17 And I said, can we have clarified who he asked. The
18 witness, I asked the attorneys if there was more information,
19 and the answer was no, this is what we have.

20 You said, I think he wants to know which attorneys
21 were asked, ePlus's are Lawson's.

22 The witness: Ms. Albert.

23 And then question, and when you asked ePlus's counsel
24 if they could obtain that information, did they actually
25 provide you with interrogatory answers in which ePlus had asked

1 Lawson to provide, on a customer-by-customer basis, all of the
2 information as to how they implemented the Lawson customer
3 systems?

4 Answer: No.

5 Did you ever receive that customer-by-customer
6 information as to their implementation?

7 No.

8 Were you aware that ePlus asked the Court to compel
9 Lawson to provide that information?

10 Yes.

11 Do you want me to keep going, Your Honor?

12 THE COURT: No. So basically this whole query got
13 started by how did they use the system. The question does, in
14 fact, call for the modules on a customer-by-customer basis of
15 whichever system is involved and how it was used.

16 MR. McDONALD: He says he didn't get any
17 customer-by-customer information. Obviously there was
18 information produced. Mr. Schultz, I believe, has more detail
19 about the scope of our response which I don't think is within
20 the four corners --

21 THE COURT: And it says, and/or which modules such
22 customer, used, purchased, licensed, et cetera. So basically
23 it is correct that the interrogatory calls for the information
24 that is the topic of the question. It is correct that the
25 Court ordered Lawson to answer the interrogatory as asked and

1 to do so by April 2nd. We know that it was extended to
2 April 8th. We know that April the 8th there was an answer, and
3 the answer confined itself basically to migration of data, and
4 on that it gave a table of 36 or so people, and then there were
5 some -- there was a supplementary part about another part of
6 migration and responsibilities for that, and they added about
7 four or five more. So that's what I know. May 18th supplement
8 doesn't really help much.

9 MR. SCHULTZ: Your Honor, there is one other piece of
10 information with respect to --

11 THE COURT: Let's get all the pieces together,
12 because I thought I had all the pieces now.

13 MR. SCHULTZ: There's one other. There's a chart,
14 appendix B, that Lawson provided.

15 THE COURT: To what?

16 MR. SCHULTZ: To the interrogatory response.

17 THE COURT: Well, I don't have that.

18 MR. SCHULTZ: It's a large Excel spreadsheet that I
19 was a part of creating that essentially goes through on a
20 customer-by-customer basis and lists the customer number, for
21 example, 359, and lists right under it the modules that are
22 associated with that particular customer. For example, 359 is
23 LSF.

24 THE COURT: Where is that exhibit?

25 MR. SCHULTZ: It was what we produced to ePlus.

1 THE COURT: Where is it now?

2 MR. SCHULTZ: We have it on a computer. I don't have
3 a physical copy of it.

4 THE COURT: How big is it?

5 MR. SCHULTZ: It is 42 pages long.

6 THE COURT: Does it cover all 300-plus customers?

7 MR. SCHULTZ: Yes, it does.

8 THE COURT: You only had 300 customers the whole
9 time, from 2003 to the present?

10 MR. SCHULTZ: It covers more than 300 customers. I
11 believe there were 1,600 customers that were on this particular
12 list.

13 THE COURT: And it shows which modules they did?

14 MR. SCHULTZ: That's correct. It lists the customer,
15 and then immediately below that it lists the modules. For
16 example, 674 customer number is ICPORQ, and then SIP.

17 THE COURT: What does that mean?

18 MR. SCHULTZ: Those are the module records.

19 THE COURT: What does it mean?

20 MR. SCHULTZ: IC is inventory control, PO is purchase
21 order, RQ is requisitions, and, Your Honor, I don't know what
22 SIP means off the top of my head. RSS.

23 THE COURT: I know what RSS means.

24 MR. SCHULTZ: RSS I do. SIP means RSS.

25 THE COURT: SAP means RSS.

1 MR. CARR: S-I.

2 THE COURT: Sounds like Dr. Seuss wrote this. So I
3 think I can't deal with this any further until ePlus looks at
4 this -- and I look at this appendix B. That's where I am right
5 now. You say that provides the information that's actually
6 called for, and either it does or doesn't; isn't that right?
7 That's all the pieces -- I don't have an inexhaustible period
8 of time in which to rule on these things, and I have a jury
9 that needs to have its business attended to which is hearing
10 cases, so that's it. Have I got all of the information except
11 that appendix B?

12 MR. SCHULTZ: Actually, no, Your Honor. I just
13 looked back at the interrogatory, and I apologize profusely.
14 There is also an appendix A. I don't have that here.

15 THE COURT: What does it provide?

16 MR. SCHULTZ: It is a chart listing on a
17 customer-by-customer basis the modules licensed by the
18 customer, the release of the modules delivered to each customer
19 in or after May of 2003, the delivery date, the module release,
20 and the last date of the customer --

21 THE COURT: Did you get that stuff, Mr. Robertson?
22 If you did, how can you make the argument you are making now?

23 MR. ROBERTSON: Your Honor, licensing revenues,
24 that's what that was directed to. It had nothing to do with
25 what was implemented on a customer-by-customer basis.

1 THE COURT: Why would they pay licensing revenues on
2 something they hadn't implemented? I mean, come on. I mean,
3 that may be the only form of information they had it in, but if
4 they provided it in that form, that's seems to me to be
5 sufficient. Nobody pays for implementations they don't use, or
6 if they do, they really are -- it's -- I won't get into that
7 economic theory.

8 MR. ROBERTSON: Your Honor, there are instances where
9 they do license and sometimes don't implement it, but I'll go
10 back and look at appendix B.

11 THE COURT: And A. And I'm telling you something.
12 I've about had it with this kind of stuff, because look what
13 it's taken for me to wrestle with this, and somebody could have
14 gone back and said, the answer to this lies in appendix A and
15 B, and if it's there, it's there.

16 MR. STRAPP: Your Honor, maybe I can clear this up.
17 Appendix A through D was provided to ePlus on December 23rd,
18 2009, months before this motion to compel. We already had the
19 appendix. We said that was insufficient, wasn't responsive to
20 interrogatory 24. Your Honor granted the motion to compel
21 notwithstanding that appendix A had already been in our hands
22 for months.

23 So to the extent that they are referring back to
24 something that we already had when we made the motion and the
25 motion is granted, I think that's irrelevant here.

1 MR. SCHULTZ: Your Honor, the supplementation,
2 however, is on top of what we had already provided which is
3 included in appendix A, B, C, and D. There was actually four
4 exhibits that were provided with the interrogatory after
5 looking back at it. There's clearly all of the information
6 with respect to the customer-by-customer basis that was
7 requested, and it's all the information that Lawson had.

8 In addition, we cited the Bates number range for each
9 of the documents associated with each customer and the
10 statement of work and the RFP response. It clearly was
11 sufficient to respond to the interrogatory, specifically
12 interrogatory number 24.

13 THE COURT: Okay. Sit down, please. We're going to
14 tell the jury to disregard those questions and answers that
15 dealt with that, that there was a failure of communication
16 respecting what was communicated.

17 That gets us through question four, and I think that
18 resolves this motion, but I'm not sure it does, so I'll not
19 rule on that at this time. I'm just ruling on the jury's
20 questions right now.

21 Question three, can one contact the U.S. Patent
22 Office for existing patents search? The answer to that is yes,
23 isn't it?

24 MR. McDONALD: Your Honor --

25 THE COURT: I don't know who is going to put it on in

1 testimony.

2 MR. McDONALD: This ties into question number one,
3 Your Honor, where I think it's implicit with that question
4 number three that they are assuming there's some sort of
5 duty --

6 THE COURT: You are assuming that it does. I'm not
7 going to assume what relates to what.

8 Who decides if a patent is valid. The answer is,
9 they do, the jury does; right?

10 MR. McDONALD: Right.

11 THE COURT: Is the U.S. Patent Office notified and
12 their opinion sought if the validity of a patent is questioned?

13 MR. ROBERTSON: Your Honor, could I just be heard on
14 who decides if a patent is valid? I mean first, the Patent
15 Office determines whether or not it's patentable and adds the
16 presumption of validity from there, and then -- but as the tape
17 they saw indicates, if it's found it's in dispute, they're
18 going to be -- they decide, they make that determination.

19 MR. McDONALD: The question is who. The answer is
20 the jury. I don't think it's more complicated than that.

21 MR. ROBERTSON: I think the PTO first decides that
22 it's a valid patent, and now it's in dispute here.

23 MR. McDONALD: There was no patent until the Patent
24 Office issued it, but now that it's issued --

25 THE COURT: The answer is the PTO decides to issue

1 the patent, and it's presumed valid, and if there's a dispute
2 about it, the jury decides whether or not there's validity.

3 MR. ROBERTSON: Your Honor --

4 THE COURT: Is the U.S. Patent Office notified and
5 their opinion sought if the validity of a patent is questioned.

6 MR. McDONALD: This gets into -- we'd love to answer
7 that question, Your Honor. You know the re- exam is going on.

8 THE COURT: That's a different -- that's not the
9 validity they are taking about. They don't have any basis for
10 understanding that.

11 MR. McDONALD: I'm not trying to say I should answer
12 the question that way, but I did want to say there is a process
13 for that that the jury is not hearing about. It's prejudicial
14 to us, I think, with the question like that hanging out there,
15 and to have them again mention the presumption of the validity,
16 I think, is unfair when we can't tell the jury the other side
17 of the story there which is that we could go and did go back to
18 the Patent Office for examination.

19 MR. ROBERTSON: There's no other side of the story
20 because the case law is it is presumed valid even when pending
21 re-examination, but the answer, Your Honor, specifically to
22 this question is when a suit is filed, the PTO is, in fact,
23 notified of -- that the patent's in suit.

24 MR. McDONALD: Not --

25 THE COURT: Is notified that the patent is in suit or

1 that the validity is in question?

2 MR. ROBERTSON: No, just that the suit has been filed
3 that implicates the patent. A suit's been filed that
4 identifies that patent.

5 MR. McDONALD: There's the lawsuit that's filed that
6 they were notified. A patent infringement lawsuit in ePlus's
7 complaint, which is all the Patent Office is notified about,
8 the validity of their own patents is not questioned. So that
9 is not true that the Patent Office was notified that the
10 validity was questioned. The Patent Office was notified that
11 ePlus brought a lawsuit alleging the patent was valid.

12 THE COURT: I understand. Did Lawson file for a
13 patent on its S3 system?

14 MR. McDONALD: No.

15 THE COURT: Why didn't it? I just think we tell them
16 that that's not a matter of concern in this case.

17 MR. McDONALD: I can just ask Mr. Lawson that
18 question.

19 THE COURT: All right, that's fine. You can do that.
20 I'm not sure it's important.

21 MR. ROBERTSON: Your Honor, I'm going -- I think that
22 is irrelevant, and I just don't want the suggestion to be made
23 when that question is asked, the followup question, well, why
24 didn't you, and Mr. Lawson blurt out, well, because I didn't
25 think it was patentable or something like that. That would

1 improper and irrelevant to the inquiry. You know, it also
2 starts to implicates closely again --

3 THE COURT: What is the answer? What is the answer,
4 Mr. McDonald -- McDaniel? McDonald. I'm going to name you
5 everything in the book. Sorry.

6 MR. McDONALD: I should wear a card. The answer was
7 that they just looked at it as computerizing something that
8 people had done for years manually, and they didn't think it
9 was the sort of thing you get a patent on.

10 THE COURT: I'm going to tell them that's not a
11 concern of theirs. Number one, is there a duty requirement for
12 an entity to perform due diligence and search for patents on
13 products, services, et cetera, before the entity markets and
14 sells their products/services, et cetera.

15 MR. McDONALD: The en banc decision by the Federal
16 Circuit in the CK case gives that an unequivocal no, there is
17 no such requirement.

18 MR. ROBERTSON: I think the Court doesn't need --
19 this is not a concern of the jury. The jury is not going to be
20 hearing anything on willful infringement. This is asking a
21 purely legal question which I think is inappropriate to
22 instruct the jury on, because that is not an issue in this
23 case.

24 MR. McDONALD: I think Mr. Robertson asked Mr.
25 Christopherson, you knew about these patents, but you didn't do

1 anything about it. They've opened the door to this, Your
2 Honor. I think the jury is entitled to hear -- in other words,
3 to hear there was no duty because Mr. Robertson left the
4 impression that there was.

5 MR. ROBERTSON: That was with respect to intent to
6 induce which is that he had knowledge and he hasn't done
7 anything since May of 2009 which is what I was directing my
8 question there. It's relevant directly to intent to induce.

9 THE COURT: They are talking about before they modify
10 the products -- I mean sell the products or system. I think
11 the answer is, number one, it's not a matter for your concern.
12 Number two, it's not a matter for your concern. Number four,
13 I've told you, and number three, how do you all want to handle
14 that? I think we agree, yes, the answer is yes, and the PO
15 decides to issue a patent, it's presume valid, and if there's a
16 dispute over the validity, the jury decides it, and the answer
17 is that isn't an issue in this case for the third question, it
18 seems to me.

19 MR. McDONALD: Is the first one can one contact the
20 U.S. Patent Office, Your Honor? I don't think that's their
21 concern. If you're not going to let them hear the answers to
22 these other questions, I don't think they should have that one
23 either.

24 MR. ROBERTSON: In the context of this case, I think
25 the evidence was they searched through the existing patents.

1 In fact, Mr. McDonald asked one of the inventors and showed him
2 to the cover page of the patent and showed all these patents
3 here that the examiner had actually looked at --

4 THE COURT: Wait a minute. He didn't ask -- this
5 question basically cuts both ways. It's can the inventors
6 search, and can Lawson search. I mean that's -- it has two
7 implications here.

8 MR. ROBERTSON: But patents are publicly available,
9 Your Honor, so the answer is yes.

10 THE COURT: Well, I understand that, but there's
11 another little problem called you don't -- I don't testify, you
12 don't testify, Mr. McDonald doesn't testify. So if there is a
13 stipulation, I can tell them. If there's no stipulation, you
14 still have your case open, and you can put on somebody to
15 testify about it, but I don't know if that's proper at this
16 stage of the game. I can tell them that it's public
17 information because the tape, videotape from the Judicial
18 Center says that it is.

19 MR. ROBERTSON: Well, the videotape also said that
20 the examiner's search --

21 THE COURT: Wait just a minute. It says who decides
22 the patent, who issues the patent, okay? All right. So what
23 I'm going to tell them is as you saw in the videotape, the
24 Patent Office, once a patent is issued, the whole file on it is
25 available for examination by anybody in the public, and it is

1 the Patent Office that issues a patent. And if there's a
2 dispute about the validity of the patent, it is the jury that
3 ultimately decides that dispute.

4 MR. ROBERTSON: Could I ask you, before Your Honor
5 was indicating you were going to say presumed valid but if
6 there's a dispute --

7 THE COURT: I don't know that I need to do that now.
8 I'm going to tell them that in the instructions anyway, so I
9 don't want to overemphasize it.

10 How long have we been in here? I think we're going
11 to change. I think we all need a little break, don't we,
12 before we get going? If you all come up with anything else
13 that makes me look like I'm saying something untrue to the
14 jury, the marshal has a lockup. So tell them we'll be about
15 20 minutes.

16

17 (Recess taken.)

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